No. 16-1348

IN THE

Supreme Court of the United States

MICHAEL N. CURRIER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari
to the Supreme Court of Virginia

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Neither the Commonwealth nor the Solicitor General defends the primary rationale offered by the Virginia Court of Appeals—namely, that the Double Jeopardy Clause was not violated here because there was no "prosecutorial overreaching." Nor is there any dispute that when state law requires severance to avoid unduly prejudicing the defense, the accused is entitled to invoke the issue preclusion doctrine with respect to the second trial. *See* Petr. Br. 18-19 (discussing *Turner v. Arkansas*, 407 U.S. 366 (1972) (per curiam)).

The Commonwealth maintains, however, that a slight difference in Virginia law generates the opposite outcome here. Instead of insisting upon severance in every case, Virginia law creates a defeasible requirement of severance. It provides that a trial court in the situation here must sever the charges "unless the Commonwealth and defendant agree to joinder." *Hackney v. Commonwealth*, 504 S.E.2d 385, 389 (Va. Ct. App. 1998). And according to the Commonwealth, a defendant who consents to severance of multiple charges when state law *favors* that procedure, but does not unequivocally *demand* it, waives his constitutional right to the issue-preclusive effect of an acquittal. The Solicitor General eschews the label "waiver" but likewise argues that a defendant relinquishes his ability to invoke issue preclusion by "voluntarily agree[ing]" to severance instead of a joint trial. U.S. Br. 6.

These arguments are misguided. Because issue preclusion does not necessarily bar a second trial, a defendant does not relinquish the right simply by consenting to two trials. And even if the

Commonwealth and Solicitor General were correct that the right to the issue-preclusive effect of an acquittal is nothing more in the double jeopardy context than a form of claim preclusion, a defendant would not waive that right by agreeing to severance in the circumstances here: Petitioner consented to severance to avoid undue prejudice to his right to a fair trial, and the prosecution retained its entitlement to one "full and fair opportunity" to prove allegations of criminal conduct. Indeed, by definition, the right to the preclusive effect of an acquittal applies only insofar as the prosecution has already tried and failed to prove the issue that the defendant seeks to foreclose from relitigation.

This Court should reverse and remand for an application of the issue preclusion doctrine.

ARGUMENT

I. A defendant who consents to successive trials does not waive his right to the issue-preclusive effect of an acquittal at the first trial.

A. There is no inconsistency between agreeing to separate trials and invoking the double jeopardy right to issue preclusion.

Nomenclature aside, neither the Commonwealth nor the Solicitor General quarrels over the substantive principle that governs here: A defendant can relinquish a double jeopardy right (like other constitutional rights) when he takes an action that is inconsistent with invoking the right. *See* Petr. Br. 26-28; Resp. Br. 35; U.S. Br. 19-20, 23-24.

But the Commonwealth and the Solicitor General argue that this standard—most easily conceptualized as establishing waiver by conduct—is met here.

Agreeing to separate trials, they maintain, *is* inconsistent with asserting the issue-preclusive effect of an acquittal because that right is nothing more than an "aspect" or "component" of the right against multiple trials. Resp. Br. 1, 28, 33; U.S. Br. 17-20. This contention is incorrect on both theoretical and practical levels.

1. As a theoretical matter, the double jeopardy right to the issue-preclusive effect of an acquittal cannot be understood as merely a strand of the right against multiple trials. The right against multiple trials—otherwise known as claim preclusion, *see Bravo-Fernandez v. United States*, 137 S. Ct. 352, 357 (2016)—is concerned simply with "the heavy personal strain which a criminal trial represents for the individual defendant." *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion). It is entirely indifferent to the outcome of a first trial: Even a defendant who is convicted in the first proceeding has a right not to be subjected to a second one.

Issue preclusion, as petitioner has explained, is directed at a separate concern: preserving the inviolacy of acquittals. Petr. Br. 13-15; *see also United States v. Scott*, 437 U.S. 82, 91 (1978). "A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it." *Yeager v. United States*, 557 U.S. 110, 122 (2009). The issue preclusion doctrine thus ensures that a defendant's acquittal cannot be contradicted in a subsequent prosecution against him, lest the risk of a wrongful conviction rise to an unacceptably high level and the Constitution's commitment to the citizenry's participation in the criminal justice system be fatally undercut. *See* Br. of Cato Institute 12-19.

The Commonwealth suggests in response that "some acquittals" are not inviolate. Resp. Br. 25. But neither of the cases the Commonwealth cites for this proposition supports its position here. *Standefer v. United States*, 447 U.S. 10 (1980), involved the prior acquittal of someone other than the defendant seeking to invoke its preclusive effect. Accordingly, the case did not implicate the inviolacy of a defendant's own previous acquittal; indeed, Standefer did not even advance a double jeopardy claim. *Id.* at 22 n.16; *see also Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (issue preclusion applies only if previous litigation was "between the same parties"). *Bravo-Fernandez* dealt with the special problem of inconsistent verdicts, where an acquittal cannot stand for the rejection of any prosecutorial allegation because of a jury's simultaneous conviction. *See* 137 S. Ct. at 357, 362-63; *United States v. Powell*, 469 U.S. 57, 68 (1984). Here, by contrast, petitioner was not convicted of anything at his first trial. This case thus involves an individual's "unassailable" prior acquittal, just as in *Yeager*, 557 U.S. at 123, *Ashe*, and *Turner v. Arkansas*, 407 U.S. 366 (1972) (per curiam).

The Commonwealth also harps on this Court's admonition that the Double Jeopardy Clause calls for a "guarded application" of the issue preclusion doctrine. Resp. Br. 22-26 (quoting *Bravo-Fernandez*, 137 S. Ct. at 358). But this principle pertains only to when a defendant may prevail on an issue preclusion argument—not to when he is permitted to advance such an argument in the first place. Only the latter question is presented here.

2. The issue preclusion doctrine also has decisively different practical consequences than the right against

multiple trials. Although the Solicitor General asserts (U.S. Br. 19-23) that issue preclusion is available only when it would completely bar a successive trial, issue preclusion in actuality can prevent relitigation of a previously rejected theory of criminal liability without completely barring a successive trial. Consequently, there is no logical inconsistency in consenting to severance and later invoking issue preclusion.

a. Start with this Court's canonical articulation of the right to the issue-preclusive effect of an acquittal: "[W]hen an issue of ultimate fact has once been determined by [an acquittal], *that issue* cannot again be litigated between the same parties." *Ashe*, 397 U.S. at 443 (emphasis added). The Court has repeatedly reaffirmed this description of the issue preclusion right. *See, e.g.*, *Bravo-Fernandez*, 137 S. Ct. at 356; *Yeager*, 557 U.S. at 119. If the effect of issue preclusion were necessarily that a "second trial cannot proceed," U.S. Br. 19, this Court's formulation would be a very strange way of saying that. Instead, this Court's pronouncements seem carefully drafted to establish the opposite rule—namely, that this branch of double jeopardy law bars the relitigation only of "issue[s]," *Bravo-Fernandez*, 137 S. Ct. at 359, that a previous verdict necessarily resolved in the defendant's favor.

Indeed, the Court in *Ashe* explicitly adopted a pre-existing federal doctrine that barred relitigation of issues, but not necessarily claims. *Ashe*, 397 U.S. at 443. The doctrine first developed in civil litigation, and no one denies that, in that context, issue preclusion regularly bars relitigation of an issue without barring an entire claim. *See* 18 Charles Alan Wright et al., *Federal Practice & Procedure* § 4416, at 424-25 (3d ed. 2016); Restatement (Second) of Judgments § 27, at 256

(1982). When this Court extended the doctrine to the criminal context, *see, e.g.*, *Sealfon v. United States*, 332 U.S. 575, 578 (1948), it did not limit the doctrine to cases in which a claim is barred. Nor did the Court impose such a limitation when it held that the doctrine was "embodied in the Fifth Amendment guarantee against double jeopardy." *Ashe*, 397 U.S. at 445.

Lest there by any doubt, *Ashe* itself relied on a case that squarely considered and rejected the contention the Solicitor General advances here. *Ashe*, 397 U.S. at 443 (citing *United States v. Kramer*, 289 F.2d 909, 913 (2d Cir. 1961)). In *Kramer*, the Government alleged that the defendant participated in multiple post office burglaries with the same accomplices. At an initial trial, he was acquitted of perpetrating or aiding and abetting the burglaries. 289 F.2d at 912, 915. The Government subsequently tried him for (among other things) two additional offenses involving the possession of goods stolen during the burglaries. *Id.* at 912. At this second trial, the prosecution offered testimony "substantially identical" to that which it had presented at the first trial; in essence, it argued that Kramer obtained the stolen goods by participating in the burglaries. *See id.* at 915. This time, he was convicted.

On appeal, Kramer argued that his acquittal at the first trial should have precluded the Government from relitigating his alleged involvement in the burglaries. 289 F.2d at 912. The Government responded that issue preclusion was unavailable because involvement in the burglaries was not "an issue essential to a conviction in the second trial." *Id.* at 915. That is, the Government argued—just as the Solicitor General does here—that issue preclusion is available only if

barring relitigation of the previously litigated *issue* necessarily would bar the successive trial. *See id.*

Writing for the Second Circuit panel, Judge Friendly rejected this argument as "utterly captious." *Kramer*, 289 F.2d at 916. He reasoned (in a passage that warrants extended recitation):

> A defendant who has satisfied one jury that he had no responsibility for a crime ought not be forced to convince another of this, even in a prosecution where in theory, although very likely not in fact, the Government need not have tendered the issue. . . . [T]o permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment . . . . The very nub of collateral estoppel is to extend *res judicata* beyond those cases where the prior judgment is a complete bar. The Government is free, within the limits set by the Fifth Amendment, to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it on the first trial . . . .

Id. at 915-16 (citations omitted). Accordingly, the Second Circuit reversed the convictions on the two charges related to the receipt of stolen goods and

ordered a new trial on those charges, instructing the lower court to "exclude all evidence which, if believed, would necessarily show Kramer to be a principal or an aider or abetter in the burglaries." *Id.* at 921.

Results like this are now commonplace. Summing up the current legal landscape, then-Judge Gorsuch explained for Tenth Circuit: The Double Jeopardy Clause's issue preclusion prong "precludes relitigation not only of ultimate issues [at a second trial] already determined by a final judgment" of acquittal; it sometimes merely "restrict[s] the proof the government might seek to use" at the second trial. *United States v. Wittig*, 575 F.3d 1085, 1096 (10th Cir. 2009). Accordingly, "[s]ometimes, a defendant will argue that collateral estoppel requires suppression of particular pieces of evidence, or the striking of a specific [theory] alleged in an indictment, because introduction of such evidence to prove the charges will trench on a previous judgment of acquittal." When the defendant's argument has merit, the double jeopardy right to the issue-preclusive effect of an acquittal "is deployed . . . to do something *other* than dismiss an indictment." *Id.* (emphasis in original).

b. The Solicitor General protests that barring relitigation of an issue but not a second trial conflicts with the Double Jeopardy Clause's text, which prohibits only "being tried twice for the 'same offence.'" U.S. Br. 19. But Judge Friendly's reasoning—and the modern practice following it—are sound. When the prosecution spins multiple charges out of the same episode and then relitigates a theory of liability that a jury already rejected, the defendant is effectively on trial a second time for the same offense—even if the new charge is formally distinct under *Blockburger v.*

United States, 284 U.S. 299, 304 (1932). By contrast, when the prosecution pursues the new charge using a theory of liability that has not yet been rejected, there is no double jeopardy violation because the defendant is truly on trial for a different offense.

The Solicitor General is similarly incorrect that *Dowling v. United States*, 493 U.S. 342 (1990), rejected the concept that the Double Jeopardy Clause's issue preclusion prong can "limit the evidence presented at a second trial, rather than prohibit the proceeding altogether." U.S. Br. 7; *see also id.* 20-22. *Dowling* does not sweep so broadly.

In *Dowling*, the Court "decline[d] to extend *Ashe*" to forbid the prosecution from introducing evidence, under Fed. R. Evid. 404(b), of a crime for which the defendant was acquitted but which was a separate criminal episode from the current charges. 493 U.S. at 348.[1] The charge for which Dowling was acquitted took place "approximately two weeks" after the events that gave rise to the second trial, and it involved different property, a different location, and different victims. *Dowling*, 493 U.S. at 344; *see also United States v. Felix*, 503 U.S. 378, 386 (1992) (stressing that the two crimes in *Dowling* were "unrelated"). In those circumstances, it could not be said that the defendant was being tried a second time for the same offense.

Here, by contrast, the two trials involved the same criminal episode—just as in *Kramer*, 289 F.2d at 916

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[1] Rule 404(b) bars the prosecution from introducing evidence of a defendant's past criminal or wrongful conduct "to prove [the defendant's] character to show that on a particular occasion the [defendant] acted in accordance with the character." Fed. R. Evid. 404(b)(1). But it sometimes allows the introduction of such evidence "for another purpose." Fed. R. Evid. 404(b)(2).

("same course of conduct"); *Ashe*, 397 U.S. at 446 ("same robbery"); *Yeager*, 557 U.S. at 119 ("same criminal episode"); and *Turner*, 407 U.S. at 368-69 ("the same set of facts, circumstances, and the same occasion"). That, as explained just above, is when issue preclusion kicks in to limit the prosecution's ability to prosecute someone twice for what is functionally the same offense. And the doctrine does not necessarily bar a second trial; it simply bars the prosecution "from relitigating any *issue* that was necessarily decided by [the] jury's acquittal in a prior trial." *Yeager*, 557 U.S. at 119 (emphasis added).

To be sure, the Court observed in *Dowling* that "unlike the situation in *Ashe*," Dowling's prior acquittal "did not determine an ultimate issue in the [second] case." 493 U.S. at 348. But contrary to the Solicitor General's assertion (U.S. Br. 21), the Court did not establish that as a categorical prerequisite for applying the issue preclusion doctrine. Instead, the Court held only that the Double Jeopardy Clause does not "exclude *in all circumstances*" otherwise admissible evidence "simply because it relates to alleged criminal conduct for which a defendant has been acquitted." *Id.* (emphasis added).

Extending *Dowling* from the Rule 404(b) context in which it was decided to retrials involving the same course of previously acquitted conduct would not only be doctrinally improper and upend widely accepted practice across the federal courts; it would also lead to unacceptable results. Once again, Judge Friendly foresaw why in *Kramer*:

> On the Government's argument, if a postal inspector had been killed during one of the robberies [for which Kramer was acquitted],

> Kramer's acquittal would bar, as *res judicata*, a later prosecution for first-degree murder under 18 U.S.C. § 1114, since participation in a burglary would be an essential element of the crime, 18 U.S.C. § 1111; but, in a prosecution for second-degree murder or for manslaughter, the Government would be free . . . to repeat all the testimony about Kramer's presence on the scene which the [first] jury disbelieved, since it would not be essential for the Government to establish burglary in order to convict on the lesser charge.

289 F.2d at 916.

Put another way, if the issue preclusion doctrine were limited to subsequent trials in which the prosecution had no *theoretical* way to prove an element of the charged offense besides relitigating facts a prior jury rejected, then the doctrine would offer little meaningful protection. The prosecution can almost always conjure up a new charge respecting the same incident that does not necessarily require proving a fact the first jury necessarily rejected. Accordingly, the only way for the issue preclusion doctrine to serve its function is for it to be "set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Yeager*, 557 U.S. at 120 (quoting *Ashe*, 397 U.S. at 444). That requires barring the prosecution from relitigating factual allegations the jury necessarily rejected at the first

trial, even if the prosecution may legitimately proceed on a theory the first jury did not necessarily reject.[2]

c. Finally, even if the Solicitor General were right that the issue preclusion doctrine requires that the issue the defendant seeks to foreclose from relitigation be an "ultimate" one in the second proceeding as well as the first, it still would not follow that whenever issue preclusion applies, it bars a successive trial. Issues of ultimate fact depend on the theories and evidence actually advanced by the parties—in a second trial no less than in a first one. So even under the Solicitor General's view, the doctrine would work only to bar *particular ways* in which a second trial might proceed. *See, e.g.*, *Wittig*, 575 F.3d at 1091, 1097, 1099-1101.

Consider *Ashe* itself. There, the issue preclusion doctrine prevented the prosecution from arguing at the second trial that Ashe was "one of the robbers" who held up the poker players at gunpoint. 397 U.S. at 445. But if the prosecution at the second trial had

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[2] The Solicitor General is wrong that this conception of the issue preclusion doctrine is somehow inconsistent with allowing immediate appeals of orders denying motions to dismiss indictments on double jeopardy grounds. *See* U.S. Br. 18-19 (citing *Abney v. United States*, 431 U.S. 651 (1997)). When a defendant asserts that his right to the preclusive effect of an acquittal effectively "forbids a second trial" (at least under the particular prosecutorial theory laid out in an indictment), immediate review is indeed warranted. *E.g.*, *Harris v. Washington*, 404 U.S. 55, 56 (1971) (per curiam). But when a double jeopardy issue preclusion claim "would at most suppress some evidence but not preclude trial on the charge," all eight circuits to consider the issue have held that an interlocutory appeal is impermissible. *United States v. Wright*, 776 F.3d 134, 141 (3d Cir. 2015) (citing *Wittig*, among other cases).

endeavored to prove that Ashe waited outside during the robbery and then drove the getaway car, the issue preclusion doctrine would not have stood in the way of that trial.

This case also illustrates the point. With the benefit of hindsight, it is clear here that an ultimate issue from petitioner's first trial—his alleged participation in the break-in and theft of the safe—was also an issue of ultimate fact at his second trial. *See infra* at 22-24. But that was true only because the Commonwealth's theory of how petitioner came to possess the guns made it so. Petitioner's participation in the break-in would not have been an ultimate issue in the second trial if, for example, the Commonwealth had alleged that petitioner had been fishing in the river when Wood and some other accomplice showed up with the safe, and petitioner then helped them empty it out. But, of course, the Commonwealth presented no such theory. *See* J.A. 100-01.

In sum, even on the Solicitor General's view, issue preclusion does not necessarily operate—as claim preclusion does—to bar a successive trial. Rather, issue preclusion can bar only a subset of possible trials in which the prosecution rests its case on a theory of liability that a jury has already rejected. And that being so, merely consenting to successive trials is not inconsistent with—and thus does not foreclose—a defendant's later insisting upon the issue-preclusive effect of an acquittal.

B. Even if issue preclusion were nothing more in the double jeopardy context than a species of claim preclusion, the equities here would still preclude waiver.

The Commonwealth cannot dispute that even when it comes to the Double Jeopardy Clause's protection against multiple trials, defendants do not waive that protection when they have "no meaningful choice" but to consent to successive trials. Resp. Br. 40. Such is the case here. Thus, even if the right to the preclusive effect of an acquittal were simply a species of claim preclusion, defendants in petitioner's situation would still be entitled to assert that right—particularly because it would not unfairly affect the prosecution.

1. The Commonwealth implicitly accepts (as it must) that introducing evidence of a prior conviction in a trial at which that evidence is not an element of one or more charges presents a grave risk of undue prejudice. Petr. Br. 30; *see also* Br. of Indiana et al. 10 ("no denying" prospect of "unfair prejudice"); Br. of NACDL 9-16. But the Commonwealth argues for three reasons that this risk of prejudice is insufficient to prevent waiver here. None of these arguments succeeds.

a. The Commonwealth claims that potential prejudice prevents a double jeopardy waiver only when a defendant is "forced to choose between competing *constitutional* rights." Resp. Br. 40 (emphasis added); *see also* U.S. Br. 28 (stressing that Virginia does not deem severance under the circumstances here to be "constitutionally compelled"). Not so. In *Green v. United States*, 355 U.S. 184 (1957)—the foundational "no meaningful choice" case

in the double jeopardy context—the Court held that when a defendant appeals a conviction and requests a new trial, he does not waive the defense of former jeopardy to a second prosecution on a greater charge. *Id.* at 191-93. Yet "[t]here is, of course, no constitutional right" to appeal a criminal conviction. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). The right is "purely a creature of statute." *Abney v. United States*, 431 U.S. 651, 656 (1977).

Sanabria v. United States, 437 U.S. 54 (1978), reinforces the reasoning and holding of *Green*. There, the Court held that filing a mid-trial evidentiary motion, which the trial court improperly granted (and that caused an acquittal), did not waive the right against multiple trials. *Id.* at 78. The Court did not pause to ask whether the defendant had a constitutional right to file that particular motion (much less to an erroneous ruling on it). This precedent also explains why even the plurality in the case the Commonwealth propounds—*Jeffers v. United States*, 432 U.S. 137 (1977)—acknowledged that the result there might have been different if a joint trial would have caused "undue prejudice" to the defendant's constitutional right to a fair trial. *Id.* at 153. "Undue prejudice" to the right to a fair trial is not the same thing as a violation of it. Indeed, if Jeffers had faced the problem petitioner faced here—the prospect of "prejudicial evidence" being "introduced at his trial"—he would not necessarily have waived his double jeopardy rights by requesting two trials. *Id.* at 153 & n.21.

Nothing about this Court's rejection of the double jeopardy claim in *United States v. Dinitz*, 424 U.S. 600 (1976), undercuts this analysis. In that case, the

defendant requested a mistrial (and, thus, effectively a second trial) to avoid completing a trial in which the judge had improperly expelled his lead counsel from the courtroom. *Id.* at 603-05, 608-09 n.10. Going forward in the first trial ultimately would not have caused Dinitz significant prejudice. Even if he were to have been convicted, the trial court's error would have allowed him to obtain "a reversal of the conviction, and a later retrial." *Id.* at 610. By contrast, had petitioner agreed here to a joint trial, he could not have obtained any such reversal or retrial based on the highly prejudicial admission of his prior convictions.

In any event, even Dinitz was not forced, as the price of requesting a mistrial, to forego his right to the issue-preclusive effect of any later acquittal. As the Court subsequently made clear, "[i]t cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial." *Burks v. United States*, 437 U.S. 1, 17 (1978). The Court should not hold to the contrary for the first time here.

b. The Commonwealth also suggests petitioner could have "mitigate[d]" the prejudice he would have suffered in a joint trial by taking one of two steps. Resp. Br. 42-43. Neither suggested maneuver, however, pans out.

The Commonwealth first suggests that a defendant in petitioner's shoes could offer to "stipulate that he is a felon within the meaning of the statutory offense." Resp. Br. 42. But even if a court and the prosecution would be required to accept such a stipulation (something the Commonwealth declines to concede, *see* Resp. Br. 42 & n.6), this action would require a defendant to surrender his constitutional

right to require the prosecution "prove every element of a criminal offense beyond a reasonable doubt," *Sandstrom v. Montana*, 442 U.S. 510, 512 (1979); *see also Neder v. United States*, 527 U.S. 1, 12 (1999). And even the Commonwealth acknowledges that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." Resp. Br. 41 (quoting *Simmons v. United States*, 390 U.S. 377, 394 (1968)).[3]

The Commonwealth's second suggestion—that "the defendant could ask the court to give a limiting instruction," Resp. Br. 43—fares no better. This Court has long recognized that when evidence is sufficiently prejudicial, the "assumption that prejudicial effects can be overcome by instructions to the jury" is "naive" and one that "all practicing lawyers know to be unmitigated fiction." *Bruton v. United States*, 391 U.S. 123, 129, 131 (1968) (quoting *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)). Such is the case here. "To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities." *United States v. Jones*, 16 F.3d 487, 493 (2d Cir. 1994) (internal citation omitted);

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[3] The notion that a defendant could resolve the dilemma here by agreeing to a bench trial (U.S. Br. 28) suffers from the same flaws. A defendant may not have the ability to insist unilaterally upon a bench trial. *See Singer v. United States*, 380 U.S. 24, 26 (1965); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277-78 (1942). And even if he does, requiring him to request a bench trial forces him to relinquish the Sixth Amendment right to trial by jury.

accord United States v. Lewis, 787 F.2d 1318, 1323 (9th Cir. 1986); *United States v. Carter*, 482 F.2d 738, 740-41 (D.C. Cir. 1973). The problem is all the more pronounced where—again, as here—the prior convictions are for the same type of conduct for which the defendant is being tried. *See, e.g., Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967) (Burger, J.).

c. The Commonwealth lastly argues that the fact that petitioner had "full knowledge" when he consented to severance "that [he might] be acquitted during the first trial," Resp. Br. 2, impedes his ability now to invoke his double jeopardy rights. But foreseeability that a defendant might procure an acquittal is immaterial. In *Green* and *Burks*, a favorable ruling on appeal was certainly foreseeable. And in *Sanabria*, an acquittal following a ruling on the defendant's mid-trial motion was foreseeable. The Court nevertheless refused in those cases to hold that the defendants waived their double jeopardy rights. Those cases control here.

2. The equities preclude waiver here not just because petitioner would have suffered undue prejudice at a joint trial but also because petitioner's assent to severance accorded with Virginia's preference as well.

Recall that in *Turner*, this Court held that issue preclusion was available in a second trial where state law prohibited trying the two charges together. 407 U.S. at 366-68. There is no doubt, therefore, that petitioner would be entitled to invoke issue preclusion if Virginia—like, say, Nevada—"required" severance whenever "the State seeks convictions on multiple counts, including a count of possession of a firearm by

an ex-felon," *Brown v. State*, 967 P.2d 1126, 1131 (Nev. 1998).

The Solicitor General seeks to distinguish this case on the ground that "[p]etitioner had the option to try his factually related counts in one proceeding, but he chose instead to stand trial on them separately." U.S. Br. 9; *see also id.* 12 (likening this case to *Jeffers*, where the defendant was "*solely* responsible for the successive prosecutions") (quoting *Jeffers*, 432 U.S. at 154 (plurality opinion)) (emphasis added). This argument misapprehends Virginia law. While petitioner consented to severance, he did *not* have the unilateral ability to demand a joint trial; the Commonwealth would also have had to agree to joinder. *See Hackney v. Commonwealth*, 504 S.E.2d 385, 389 (Va. Ct. App. 1998). And in petitioner's case, the Commonwealth, too, sought severance. *See* J.A. 47, 48.

For its part, the Commonwealth's position is that this case is different from *Turner* because Virginia law does not compel severance; it merely creates a strong presumption in favor of that mode of proceeding, *see supra* at 1. But this minor variation in state law has no import. Virginia—just like Nevada—has decided that the interests of "justice" are best served in this situation by severance. *Hackney*, 504 S.E.2d at 388; *see also Brown*, 967 P.2d at 1131 (requiring severance "to ensure fairness"). And by agreeing to severance, petitioner enabled the Commonwealth to use its preferred procedure, just as the prosecution was able to do in *Turner*.

Nor, contrary to the Commonwealth's related argument, does it matter that a defendant in petitioner's situation "obtain[s] a benefit" from

severance, Resp. Br. 39—namely, avoiding the serious risk that the jury will "prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge," *Michelson v. United States*, 335 U.S. 469, 476 (1948). Again, *Turner* forecloses this argument: The defendant there similarly benefitted from severance. *See* Petr. Br. 19 n.1. At any rate, severance benefits both parties in the circumstances here, not just defendants. The government, just like the defense, has a vital "interest in the accuracy and justice of criminal results," *Standefer v. United States*, 447 U.S. 10, 25 (1980) (citation omitted). The prosecution "wins its point *whenever* justice is done its citizens in the courts." *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (quoting an inscription on the walls of the Department of Justice) (emphasis added).[4]

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[4] For this reason, there is no cause for concern that "[a]pplying issue preclusion to cases like Currier's will deter the use of severance," Br. of Indiana et al. 16. Florida, for instance, has for decades allowed defendants in petitioner's situation to invoke issue preclusion. *See Gragg v. State*, 429 So. 2d 1204, 1208 (Fla. 1983), *cert. denied*, 464 U.S. 820 (1983). Yet Florida courts still routinely sever changes in these circumstances. *See, e.g.*, *State v. Joy*, 221 So. 3d 1281, 1282 (Fla. 2017) (felon-in-possession charge severed); *State v. Brice*, 192 So. 3d 692, 693 (Fla. Dist. Ct. App. 2016) (same); *Jackson v. State*, 183 So. 3d 1211, 1212 (Fla. Dist. Ct. App. 2016) (same); *Dorelus v. State*, 154 So. 3d 1206, 1208 (Fla. Dist. Ct. App. 2015) (same); *Jones v. State*, 120 So. 3d 135, 136 (Fla. Dist. Ct. App. 2013) (same). The same is true in Iowa, which adopted petitioner's position in *State v. Butler*, 505 N.W.2d 806, 810 (Iowa 1993). *See, e.g.*, *Pettit v. State*, 2015 WL 576030, at *1 (Iowa Ct. App. 2015) (same); *Rankins v. State*, 2014 WL 1494898, at *5 (Iowa Ct. App. 2014); *State v. Hoover*, 2013 WL 4506511, at *1 n.1 (Iowa Ct. App. 2013) (same).

That leaves the Commonwealth's complaint that allowing petitioner to invoke issue preclusion here would "deny the Commonwealth 'its right to one full and fair opportunity to convict those who have violated its laws.'" Resp. Br. 39 (quoting *Ohio v. Johnson*, 467 U.S. 493, 502 (1984)). Yet petitioner has already explained that the "full and fair opportunity" principle "is no way imperiled here. Issue preclusion, by its very nature, extends only to issues that the prosecution has fully litigated and that were necessarily decided against it." Petr. Br. 32. In other words, petitioner is not seeking to invoke issue preclusion as a sword—only as a shield to prevent the Commonwealth from relitigating allegations the jury rejected at the first trial.

The Commonwealth offers no response to this explanation. And this reality cements the fairness of allowing petitioner to insist upon the issue-preclusive effect of his acquittal.

II. The Commonwealth's contention that it did not relitigate any issue of ultimate fact is irrelevant and incorrect.

Roaming beyond the question presented, the Commonwealth asks for an affirmance on the alternative ground that it did not relitigate any issue of ultimate fact at petitioner's second trial. Resp. Br. 43-51. This Court should not consider this argument. If for some reason the Court were to address the argument, it should reject it.

1. This Court's customary practice is to resolve constitutional issues and then leave it to lower courts in the first instance to apply the law to the facts of the case. *See, e.g.*, *Manuel v. City of Joliet*, 137 S. Ct. 911, 922 (2017); *Peña-Rodriguez v. Colorado*, 137 S. Ct.

855, 870-71 (2017). There is no reason to deviate from that practice here. The trial court found that the Commonwealth relitigated allegations in the second trial that the jury in the first trial necessarily rejected. *See* J.A. 101. As the trial court put it: "[T]he connection between the larceny, the guns, and safe act as one final essential element. If [the jurors at the first trial] didn't find him guilty of the safe, they didn't find him guilty of the guns." J.A. 101.

But the Virginia appellate courts have not considered the Commonwealth's argument disputing that determination. *See* Pet. App. 1a, 10a n.1. Accordingly, the most sensible disposition would be to remand for such consideration. *See Yeager v. United States*, 557 U.S. 110, 125-26 (2009).

2. At any rate, petitioner's second trial did indeed violate the Double Jeopardy Clause's issue preclusion doctrine.

The Commonwealth cannot seriously dispute that the first jury necessarily rejected the allegation that petitioner participated in the theft of the safe. Resp. Br. 50-51.[5] What is more, the Commonwealth admitted below—and the trial court agreed—that the prosecution relitigated that very issue in the second

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[5] The Commonwealth muses in a lone footnote that the first jury "could have concluded that Petitioner unwittingly helped Wood steal the safe, believing Wood had permission to take his uncle's property." Resp. Br. 51 n.7. But petitioner never made the slightest such contention at the first trial. Instead, he maintained that he "did not participate at all" in the crime. Trial Tr. 89. And the Commonwealth agreed in its closing argument that "only one issue and one issue alone" was "in dispute": whether petitioner "was involved in the offense." J.A. 35.

trial. VA Jt. App. 571; J.A. 101; *see also* Petr. Br. 6 (recounting evidence).

The Commonwealth nevertheless argues that it did not violate the Double Jeopardy Clause at the second trial because the felon-in-possession charge turned exclusively on whether petitioner handled the guns during the moments when he helped dispose of the stolen safe. Resp. Br. 48.

This contention misapprehends how the Double Jeopardy Clause's issue preclusion doctrine works. The relevant inquiry is not the "hypertechnical" one the Commonwealth imagines. *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). Instead, the inquiry is a "practical" one that hinges on "realism and rationality." *Id.* (quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1948)). If the jury at the first trial rejected a factual allegation that the prosecution advanced—or at least one that a "rational jury" would need to believe in order to convict—at the second trial, then the second trial contravened the Double Jeopardy Clause. *Id.* (quoting *Sealfon*, 332 U.S. at 579).

That limitation was transgressed here. The gun safe weighed over 700 pounds; it was so heavy that it could not "be moved [by] one person." J.A. 94. And the only person the Commonwealth ever suggested assisted Wood with the crimes was petitioner. Consequently, the jury at the second trial had to believe the Commonwealth's claim that petitioner helped Wood lift the safe and steal it from the Garrison's home. As the Commonwealth itself explained to the trial judge: "It's *impossible* for the jury to understand how we get a safe in the river without the—and how we connect Mr. Currier to the safe in the river without that prior, that prior

involvement there in the house." J.A. 57 (emphasis added); *see also id.* 100-01 (trial judge recognizing that "the guns being accessed by Mr. Currier" depended upon proving "the larceny" allegation).

In short, there is only one realistic and rational interpretation of the jury's acquittal: It determined that petitioner did *not* help steal the safe. Nevertheless, the Commonwealth advanced a factual theory in the second trial that depended on proving this very allegation. In so doing, it violated petitioner's double jeopardy right to the issue-preclusive effect of an acquittal.

CONCLUSION

For the foregoing reasons, the judgment of the Virginia Supreme Court should be reversed.

Respectfully submitted,

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